INADEQUACY OF THE PRESENT FEDERAL STATUTE REGULATING INTER-STATE RENDITION.

When the Fathers inserted in the Constitution of the United States the provision that the Congress shall have power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes" States-rights advocates could scarcely have apprehended that their successors in political faith would regard it as a veritable "Pandora Box." Direct legislation under this clause was not resorted to for many years, but through the Interstate Commerce Act and the Sherman Act the Interstate Commerce Clause has proved perhaps the most prolific source of federal paternalistic government. It was also provided in the Constitution that

"A person charged, in any State, with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."[1]

This clause, in one sense correlative of the Interstate Commerce Clause, is more radically important than it for the maintenance of a national government. Unless, indeed, authority for interstate rendition of fugitives from justice had been incorporated in the fundamental law and its spirit had been reasonably well observed, there would have ensued a condition more or less approximating interstate anarchy. The better opinion is that, as all attributes of sovereignty not delegated to the general government are reserved to the several States, if the matter had not been touched upon in the Constitution, the States would have had the discretionary right to surrender alleged criminals.[2] But there could have been no

[1]Art. IV, sec. 2, subd. 2.

[2]An article by Mr. Charles P. McCarthy in the *Green Bag* for November, 1907, (19 Green Bag 1636) on "A Constitutional Question Suggested by the Trial of William D. Haywood," takes as its text the case of one Haywood and others who were charged with being accessories while in Colorado to a murder committed in Idaho. Through connivance between officials of the two States the suspects were kidnapped in Colorado by officers of Idaho and transferred to the latter State. The Supreme Court of the United States decided, in accordance with well established law, that the prisoners were not entitled to be returned to Colorado because of the irregular manner by which their presence had been procured in Idaho. As it was probably just and proper under the circumstances that those defendants should be submitted to the jurisdiction of the Idaho court, Mr. McCarthy deduces an illustrative argument for the adoption of an orderly

assurance of uniformity or consistency of policy by state officers in responding to demands for extradition, or of state statutes in attempting to regulate it. The arbitrary refusals which, notwithstanding the law, state executives have often given, instances of which will be hereafter referred to, forcibly indicate the chaotic conditions that would have prevailed.

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legal procedure to accomplish a similar result in all cases. It is conceded that congressional legislation on the subject could not be had without a constitutional amendment authorizing it. It was further suggested, however, that the States might legislate on the subject. The power of the States, through undelegated sovereignty, seems clear. Moreover, legal analogies would not be violated as, according to the common law, the place of the commission of a crime is not where the act was set in motion, but where it takes effect. There is, however, a serious question of the expediency of the proposal.

There have undoubtedly been anomalies and abuses under the present law. The most striking illustration is furnished by the case of State *v.* Hall (1894) 114 N. C. 909; 115 N. C. 811. It appeared that the defendants, being in North Carolina, fired a shot which caused the death of a person across the boundary line in Tennessee. The defendants were tried for murder in North Carolina; but its Supreme Court held that the courts of Tennessee alone had jurisdiction because the prisoners "were deemed by the law to have accompanied the deadly missile sent by them across the boundary and to have been constructively present when the fatal wound was actually inflicted." Subsequently, a demand to extradite them from North Carolina to Tennessee was denied upon the ground that they had not been physically present in the latter State. The circumstances were very flagrant and the miscarriage of justice very gross. If it were not that the majority of the States have changed the common law by statute, so that a person is now guilty of a crime both in the State where the act is set in motion and where it takes effect, necessity for extension of the extradition privilege would be very pressing.

In the opinion of the writer the agitation for state legislation may well be directed towards universalizing such change in the common law so that there shall not remain in the Union a forum as impotent as that of North Carolina in State *v.* Hall. There may be set off against that lamentable judicial fiasco the case of State *v.* Botkin (1901) 132 Cal. 231, 98 Pac. 861. The defendant deposited poisoned candy in the mail within the State of California directed to a person in the State of Delaware, where it was received by the latter, who died from eating it. After a long and obstinate litigation the conviction of the culprit has finally beeen affirmed by the Supreme Court of California, and she is now serving a life sentence for her crime. So much individual oppression would result if the authority existed summarily to remove a person, even though she had never been within the demanding State, and try her on a criminal charge far distant from her home and her friends, that not improbably in the long run the law as it exists is more conducive to justice. The following language from the opinion in *Ex parte* Smith (1842) 3 McLean 121, 136-7, though uttered apropos of the duty of care in sifting evidence, is not inappropriate:

"No case can arise demanding a more searching inquiry into the evidence than cases arising under this part of the constitution of the United States. It is proposed to deprive a free man of his liberty—to deliver him into the custody of strangers, to be transported to a foreign State, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him—separated from his friends, his family, and his witnesses, unknown and unknowing. Had he an immaculate character it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis."

The extradition function is, indeed, so important that Congress, as early as 1793, adopted a statute to prescribe the manner of its exercise. By an Act, approved on February 12th of that year, as substantially reproduced in section 5278 of the Revised Statutes, it was provided:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged."

If the necessity for early legislation had not been so urgent, an Act framed at a recent time would doubtless have been—like the Interstate Commerce Act—more positive and full both as to general principles and details. In the main the spirit of the remedy has been sufficiently effectuated to enable the nation to get along without additions to the substance of the original statute. Theoretically, however, the law is inadequate and practically it has proved so in a very large number of cases. It is the purpose of the present paper to point out a few of the more prominent respects in which the federal statute requires clarification and extension.

The present statute has led, and will continue to lead, to a vast amount of judicial legislation under the guise of "interpretation," not only by the federal courts but by the courts of the various States. The inevitable conflict and confusion were exemplified by the judicial controversy, lasting for many years, over the question whether when a fugitive had actually been surrendered he could be tried in the demanding State for an offence other than the one for which he was extradited. Many of the state courts held that the principles of international extradition, as laid down in *United States* v. *Rauscher*[3], controlled, and that the treaty guarantees of

[3](1886) 119 U. S. 407.

one surrendered by a foreign nation were available to an interstate fugitive, so that he could not be held for a different crime without being suffered to return to the surrendering State with, of course, the necessity of again demanding his rendition. Many other state courts, however, took the view which was finally laid down authoritatively by the Supreme Court of the United States in *Lascelles* v. *Georgia*.[4] It was therein held that a fugitive from justice who has been surrendered by one State of the Union to another State, upon requisition charging him with the commission of a specific crime, has, under the Constitution and laws of the United States, no right, privilege or immunity to be exempt from indictment and trial in the State to which he is returned for any other or different offence from that designated in the requisition, without first having an opportunity to return to the State from which he was extradited.

Although this main point is now settled, after many years of counting of judicial noses, certain questions akin to it are yet the subject of clash. The courts of some States, among them Wisconsin[5] and Michigan,[6] hold that one surrendered to the criminal justice of a State is not subject to civil process, or arrest on civil process, until after a reasonable time and opportunity to return to the State from which he was taken. The courts of New Jersey[7] and of Minnesota[8] have taken the opposite view. As usual, there is considerable to be said on both sides of the controversy. The courts that assert immunity from detention on civil process emphasize the fact that the civil action almost invariably involves the same circumstances as the criminal prosecution and that the rendition proceedings may be groundlessly or fraudulently instigated in order to have the defendant brought within the jurisdiction. It is pointed out, on the other hand, that "the accused does not come voluntarily into the State, induced thereto by circumstances which could be regarded as affording the assurance on the part of the State that while detained here he shall be exempt from liability to ordinary civil proceedings. * * * He is compelled by legal process to come, irrespective of his will or consent."[9]

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[4](1893) 148 U. S. 537.

[5]Moleter *v.* Sinnen (1890) 76 Wis. 308; State *v.* Boynton (Wis. 1909) 121 N. W. 887.

[6]Weale *v.* Clinton (Mich. 1909) 123 N. W. 31.

[7]Rutledge *v.* Krauss (1906) 73 N. J. L. 397.

[8]Reid *v.* Ham (1893) 54 Minn. 305.

[9]Reid *v.* Ham *supra.*

It is also urged:

"In our State we hold it to be the duty of a private citizen to complain against one known to have committed a crime, and there may be a question whether he can bring on the trial of a civil suit arising out of the criminal act of the defendant until he has performed his public duty."[10]

Considering the position taken by the Supreme Court of the United States in *Lascelles* v. *Georgia,* it would seem that the courts denying exemption from detention on civil process have the best of the argument. In the course of time this question also may reach the Supreme Court of the United States; it is, however, desirable that Congress now definitely prescribe the privileges and immunities of persons surrendered.

A very grave defect in rendition law was exemplified by the *Opinion of the Justices.*[11] By such judicial utterance the Governor of Massachusetts was advised that he had no power by virtue of the Federal Constitution, or otherwise, to grant a demand by the Governor of New York for the return of a fugitive from the justice of New York who at the time was lawfully held in a penal institution of Massachusetts under an unexpired sentence imposed for violation of its laws. As matter of fact the prisoner was serving a term of imprisonment in Massachusetts for burglary and was demanded by the Governor of New York on a charge of murder in the first degree. If the doctrine of that opinion be the law it certainly ought not to be the law. It would abet a person who had been guilty of murder in one State in going into another State and there committing a comparatively trivial offence and pleading guilty for the express purpose of avoiding rendition. There has been much judicial discussion and conflict over the duty of a Governor to surrender a person who is held on a criminal charge in the State of the asylum. As will be hereafter shown, the Governor of the asylum State ought not to exercise a general discretion whether or not to surrender a fugitive. Where, however, the fugitive is charged with crime in the asylum State it may be regarded as settled that the discretion exists.

In *Taylor* v. *Taintor,*[12] it was said that the duty of the Governor of the State of the asylum is not absolute and unqualified. "If the laws of the latter [the asylum] State have been put in force against the fugitive, and he is imprisoned there, the demands

[10] Rutledge *v.* Krauss *supra.*

[11] (1909) 201 Mass. 609.

[12] (1872) 16 Wall. 366.

of these laws may first be satisfied. The duty of obedience then arises and not before."

In *Roberts* v. *Reilly*[13] it was held that "it is discretionary with the State upon which demand is made for surrender of the fugitive from justice to surrender him, even if the allegations charge acts done by him in the State surrendering which amount to a crime by its laws" (syllabus). In the opinion of the latter case it is said that "the State of Georgia may choose to *waive* the exercise of its jurisdiction by surrendering the fugitive to answer to the laws of New York." This question is treated in Moore on Extradition as follows:

"The refusal to surrender a person who is under a criminal charge in the State upon which the demand is made is not an exercise of discretion in the usual sense, but merely the assertion of a universal principle wholly consistent with the imperative provisions of the constitution. Those provisions, being intended to promote justice, but not to prefer the justice of one State to that of another, should be construed in accordance with that principle. The case of a person held on criminal process in the State in which he is found and from which his surrender is demanded should be regarded as *casus omissus*. It could not have been intended, for example, that a person held in one State on a charge of murder should be delivered over on demand to the authorities of another State on a charge of larceny. It should rather be said that the 'discretion' of the governor in such a case consists in the exercise of the power, if he possesses it, to surrender the person demanded, notwithstanding that he is in custody on criminal process."[14]

The converse of the proposition laid down by that learned author ought to apply, so that in such a case as that passed upon by the justices of the Supreme Judicial Court of Massachusetts it should be said that it could not have been intended that a person held in one State, or even convicted and serving a sentence therein, for larceny, should not be delivered over on demand to the authorities of another State on a charge of murder. The reasoning of the learned justices is not satisfactory or convincing. For example, they said:

"It has been said that the State in which the fugitive is found may waive its right to punish him for a violation of its own laws and deliver him up to the authorities of the other State. Doubtless this is true, but it does not follow that any one of the

[13](1885) 116 U. S. 80.

[14]Vol. II, sec. 618.

three departments—the executive, legislative or judicial—which together represent the sovereignty of the people in their government, can waive this right alone."[15]

This reads like the special plea of a timid man shirking responsibility. The Massachusetts Justices also contend that the Governor has no power in the premises, as his only constitutional authority after conviction lies in the exercise of the pardoning power. This point seems to be entirely beside the mark. The surrender of a fugitive would not be an act of pardon, or its equivalent. The Governor does not act under the State Constitution at all, but as an independent officer discharging a duty imposed upon him by the United States Revised Statutes, pursuant to the Federal Constitution. As such federal officer he may properly refuse the surrender if the exigencies of criminal justice in his own State so require. Waiver by a State is necessarily only another name for the exercise of a Governor's discretion, and it would seem that such discretion should cover persons convicted, as well as those merely accused of crime.

The situation is further complicated by the position taken in some States refusing a surrender when the person demanded is in custody or on bail in a civil action. We believe that the weight of authority and certainly the better opinion are followed by the Supreme Court of California in holding in *Ex parte Rosenblatt*[16] that the rights of a private suitor must yield to the paramount public interest. The opposite view, however, has been taken by the Supreme Court of New Jersey in *Matter of Troutman*[17] and at a Special Term of the New York Supreme Court in *Matter of Briscoe.*[18]

Without further discussion it must be apparent that public expediency demands a comprehensive federal enactment, classifying grades of crime and providing for the surrender of a person charged with a serious felony in one State, although he may be charged with, or have been convicted and sentenced for, a misdemeanor, or a minor grade of felony, or be in custody on civil process, in another State. It is undoubtedly true that the work of framing a satisfactory clause would be one of grave study and thought, but it is believed that the task is not insuperable. The

[15]Opinion of the Justices (1909) 201 Mass. 609, 611.
[16](1876) 51 Cal. 285.
[17](N. J. 1854) 4 Zab. R. 634.
[18](1876) 51 How. Prac. 422.

confusion of adjudication by state courts on this branch of the subject is very great.

The capital defect of the original federal statute still remains open and liable at any moment to defeat justice in the future as it has frequently done in the past. This defect is one of machinery rather than substantive. Section 5278 of the Revised Statutes of the United States makes it the duty of the Governor upon whom a demand is made to surrender a fugitive. The weight of authority and the stronger reasoning are to the effect that no general discretion was intended to be conferred, but that the obligation to surrender, if the requisition papers are in proper form and the prisoner is not held on any criminal charge in the State of the asylum, is imperative. This subject is discussed by Chief Justice Taney, in *Kentucky* v. *Dennison*,[19] and the language of Chief Justice Beasley of the Supreme Court of New Jersey in *Matter of Voorhees*[20] is also particularly worthy of mention. Both of these eminent jurists concurred in the view that the right given by the Constitution to "demand," "implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy of the laws of the State to which the fugitive has fled." Unfortunately, however, this theory has by no means universally prevailed.

On many occasions Governors of States have assumed to exercise discretion, and the existing federal law provides no method for its own effectuation in such a case of gubernatorial recalcitrancy.[21] During the slavery agitation there were many instances where a demand was met with a point blank refusal. Not very many years ago the Governor of Ohio declined to surrender a fugitive negro charged with a crime in Kentucky on the assumption that he would not be afforded a fair trial in Kentucky but in all probability would be lynched. Still more recently Governor Durbin of Indiana declined to surrender Ex-Governor Taylor of Kentucky on a charge of murder in the latter State, upon the requisition in due form by Governor Beckham. It would be seriously subversive of justice and a government of laws if the right to refuse rendition were countenanced in all cases involving racial conflict or

[19](1860) 24 How. 66.

[20](1867) 32 N. J. L. 140.

[21]Kentucky *v.* Dennison *supra.*

political controversy. Such cases may indeed be the most important ones for the administration of the federal remedy. Moreover, it would be only a short step from recognizing a Governor's discretion in racial or political controversies to the assertion of a general discretion with the result of generally nullifying the federal law.

The question of the duty of the Governor of an asylum State was recently touched upon by the Supreme Court of the United States in *Marbles* v. *Creecy*.[22] A negro had been arrested in Missouri, pursuant to a requisition from the Governor of Mississippi. A writ of *habeas corpus* was obtained and the matter came before the Supreme Court on appeal from an order remanding the prisoner. The argument was made that race prejudice was so bitter in Mississippi that the petitioner was in danger, if removed there, of being lynched. The Supreme Court of the United States sustains the Circuit Court judge in overruling that point, but it is to be regretted that our highest federal authority did not speak in more unequivocal terms of the Governor's obligation. It was said in the opinion of the Supreme Court that the Governor of Missouri

"need not be controlled by considerations of race or color, nor by a mere suggestion—certainly not one unsupported by proof, as was the case here—that the alleged fugitive will not be fairly and justly dealt with in the State to which it is sought to remove him, nor be adequately protected while in the custody of such State against the actions of lawless and bad men. The court that heard the application for discharge * * * was entitled to assume, as no doubt the Governor of Missouri assumed, that the State demanding the arrest and delivery of the accused had no other object in view than to enforce its laws, and that it would, by its constituted tribunals, officers and representatives, see to it not only that he was legally tried without any reference to his race, but would be adequately protected while in the State's custody against the illegal action of those who might interfere to prevent the regular and orderly administration of justice."

This was all that was necessary to be said in the decision of the case because, as matter of fact, the prisoner had been remanded for surrender to the demanding State, but the language seems almost as if it had been carefully guarded from expression of any absolute duty on the Governor's part. It would have been of strong moral efficacy if the Supreme Court, following the precedent set by Chief Justice Taney in *Kentucky* v. *Dennison*, had added words to the effect that the Governor would not have been authorized to

[22] (1909) 215 U. S. 63.

take a different course had he chosen to assume otherwise than as he was supposed to have assumed. Notwithstanding Chief Justice Taney's expression of opinion—which, indeed, in one sense was *obiter*—State Governors have frequently and comparatively recently, for reasons that seemed sufficient to themselves, declined to surrender fugitives, and it would have been helpful to the enforcement of law to have a fresh—albeit, also, strictly speaking, *obiter*—exposition of a Governor's moral obligation.

What has been said demonstrates the expediency of supplementing the moral obligation by a legal remedy. If a Governor, upon any ground, or even arbitrarily, refuses to deliver custody of a prisoner, the matter must there end. In *Kentucky* v. *Dennison* and *Matter of Voorhees,* it is shown that "as the executive of a State is not a federal officer, the general government cannot compel the performance of a function which it has no right to annex to the office." In *Matter of Voorhees* Chief Justice Beasley pertinently remarks:

"I can entertain no doubt of the power of Congress to vest in any national officer the authority to cause the arrest in any State of a fugitive from the justice of another State and to surrender such fugitive on the requisition of the executive of the latter State. The national right to require the surrender, under the terms of the constitution, seems to me to be clear, and all that is necessary to render such right enforceable in every case is the necessary organ of the Federal government."[23]

A few years ago a bill was introduced in the House of Representatives to amend section 5278 of the Revised Statutes so as to provide that if the Governor of an asylum State shall refuse a demand on behalf of the State from which a fugitive fled, its Governor may issue his warrant "to any marshall of the United States, commanding him to arrest and bring forthwith before a court having jurisdiction of the offense, the said fugitive from justice." Such an addition to the federal statute is highly desirable and would doubtless form part of a comprehensive Act for interstate rendition.

In addition to the conflict of state decisions the general confusion is intensified by state legislation. These statutes are usually intended merely as practice acts and most of them regulate the granting and determination of applications for discharge on *habeas corpus.* Diverse and discordant systems of procedure in themselves are evils and, moreover, state judges, acting under the sup-

[23](1867) 32 N. J. L. 140, 146.

posed sanction of state statutes, have impugned the substantive spirit of the federal law. Such a decision was that in *People ex rel. Ryan* v. *Conlin,* at a Special Term of the New York Supreme Court.[24] It was made under section 827 of the New York Code of Civil Procedure. The learned judge remarked:

"In the case at bar a large amount of proof has been taken tending strongly to show that the relators were not in the state of Massachusetts, but in this state, at the time when the bonds in question were stolen. But all of this is really matter of defense to the charge. Upon the trial of the charge in the state of Massachusetts, the commonwealth must make out its case by proving the commission of the theft in question by the relators; and the ground upon which they now seek to be discharged in this state is really the defense of an *alibi,* which should properly be made and proven upon such trial. It never could have been intended by the legislature, nor is it, I think, a matter of constitutional right of the relators, that such a question as this should be tried and determined in such proceedings as these. It has been repeatedly held that the court has no right upon a question of extradition to consider the charge upon its merits, or to undertake, in any way whatsoever, to determine whether it is well founded or not. * * * *According to the letter of the statute, at least,* the only question which the court can determine is the question of the identity of the prisoner with the person against whom the charge has been made, or with the person named in the warrant of the governor."[25]

Confining his action accordingly within the four corners of the statute the judge dismissed the writ and ratified the extradition of two persons to Massachusetts, although it was made to appear presumptively that they had not been within that State at the time of the commission of the alleged crime. This decision utterly disregarded and nullified one of the cardinal principles of the whole subject, which is that interstate rendition cannot be granted for one who was merely constructively present; that actual physical presence of an accused in the demanding State at the time of the commission of the offense is indispensable to the right to demand his surrender.[26]

In Massachusetts not merely a single statute but a course of legislation may be cited. The history of it is too voluminous to be repeated here.[27] The concluding statute in the series provides for a

[24](N. Y. 1895) 15 Misc. 303.

[25]At pp. 305, 306. The italics are ours.

[26]*Ex parte* Reggel (1885) 114 U. S. 642; Hyatt *v.* Corkran (1903) 188 U. S. 691.

[27]It is given at length, with instances of the action of Governors under the various statutes, in Moore, Extradition Vol II, sec. 612.

report by the Attorney-General containing an opinion as to the "legality or expediency" of complying with the demand of the Governor of another State. These enactments in effect assert a theory of general discretion on the part of the Governor of Massachusetts whether or not to honor a requisition in behalf of a sister Commonwealth. The *Opinion of the Justices*[28] was rendered upon a consideration of general principles of law and not with particular reference to Massachusetts statutes, and accordingly, it has been above discussed in view of general principles. There is little doubt, however, that to the traditional extreme States-rights attitude of Massachusetts toward interstate rendition, is largely attributable the following conclusion of that opinion:

"As we have already seen, the Constitution of the United States gives the Governor no paramount power as against the law or justice of Massachusetts, which is being vindicated through the action of the judicial department against a guilty person. His power, under this provision of the Constitution, is subordinate to the power of his own State, through its proper officers, to hold its prisoners, convicted of crime, until their expiation under its laws has become complete."

Mr. Moore concludes his comment upon the Massachusetts statutes with this language:

"In regard to the provisions of the Massachusetts law, it may be suggested that they depart from the principle of the Constitution and the act of Congress in two respects: (1) They require evidence of the criminality of the person demanded, instead of evidence that he is 'charged' with crime; (2) They make compliance with the demand a question of 'expediency,' and not of legal obligation."[29]

Enough has been said to show the necessity of a comprehensive and complete federal statute defining individual rights, more specifically asserting the authority of the federal government, supplying additional federal machinery and regulating procedure on *habeas corpus*. Advocacy of such an extensive reform is by no means new. At a meeting of delegates of an Interstate Extradition Conference held in New York City in 1887, a proposed statute was recommended for adoption by Congress. It was the fruit of much study and thought and might well be taken as the basis of a rendition statute. In *Matter of Voorhees,* Chief Justice Beasley says that there is no doubt of the constitutional authority in Congress to provide for a federal officer to effectuate a rendition demand.

[28](1909) 201 Mass. 609.

[29]Sec. 612.

Similarly, it is believed that the elaborate scheme of legislation now suggested is as amply and indisputably within congressional power as are the radical and wide-reaching systems of commercial regulation based upon the Interstate Commerce Clause.

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